

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION TWO

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THE STATE OF ARIZONA,  
*Appellee,*

*v.*

BIANCA VIANNA VALENCIA,  
*Appellant.*

No. 2 CA-CR 2017-0127  
Filed October 18, 2018

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THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
NOT FOR PUBLICATION  
*See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.19(e).*

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Appeal from the Superior Court in Pinal County  
No. S1100CR201400378  
The Honorable Joseph R. Georgini, Judge

**AFFIRMED**

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COUNSEL

Mark Brnovich, Arizona Attorney General  
By Joseph T. Maziarz, Chief Counsel  
By Mariette Ambri, Assistant Attorney General, Tucson  
*Counsel for Appellee*

Richard C. Bock, Tucson

and

Harley Kurlander, Tucson  
*Counsel for Appellant*

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**MEMORANDUM DECISION**

Judge Espinosa authored the decision of the Court, in which Presiding Judge Vásquez and Judge Eppich concurred.

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ESPINOSA, Judge:

¶1 Bianca Valencia appeals her conviction for possession of dangerous drugs for sale, arguing the trial court fundamentally erred in permitting police testimony at trial that constituted improper drug courier profile evidence. For the following reasons, we affirm.

**Factual and Procedural Background**

¶2 We view the facts in the light most favorable to upholding the jury's verdict and resolve all reasonable inferences against Valencia. *State v. Vandever*, 211 Ariz. 206, n.2 (App. 2005). In November 2013, Valencia was stopped by an Arizona Department of Public Safety trooper on Interstate 10 near Casa Grande for excessively dark window tinting. The trooper wrote a repair order requiring Valencia to have the window tint corrected and then asked if he could search the vehicle, to which she agreed and executed a consent form. During his search, the trooper discovered an aftermarket compartment built into the vehicle's dashboard, containing approximately fifteen pounds of methamphetamine in numerous tinfoil-wrapped packages, valued at approximately \$60,000.

¶3 Valencia was arrested and taken to the police substation in Casa Grande where she was questioned by department detectives. During the recorded interview, Valencia admitted she had coordinated with a man named Chris and "two guys" in Mexico who had "been briefing" her. She said she thought her car had been loaded with marijuana, and she was aware she was doing "something illegal." She also stated the "plan was" for her to repeatedly cross the border to "make a record" of the vehicle for purposes of evading future checkpoint inspections, and to transport methamphetamine in January. Finally, Valencia asked whether she could work as an informant, stating she "could tell [police] their next load and everything."

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¶4 Valencia was subsequently indicted for sale or transportation of dangerous drugs. At trial,<sup>1</sup> the arresting state trooper testified that when he introduced himself to Valencia she immediately told him “she had just been stopped” for her window tint, which stood out to the officer as “somewhat odd,” because often “people involved in criminal activity” tell officers they were recently stopped so they will be released without further inquiry. She also told the trooper she had been in Nogales, Mexico, the night before, which stood out to him because Nogales “is a source location [where] narcotics . . . come across the border.” He further testified that of people later found to be transporting drugs for sale, “95 percent sign a consent to search form,” and that to install the type of aftermarket compartment welded into Valencia’s car, which required the Jaws of Life for police to fully access, was a “very in-depth procedure” for concealing contraband.

¶5 The prosecution then called one of the officers who had interviewed Valencia after her arrest to establish the foundation for introducing a video of the interview. The officer testified that “people who are transporting drugs have been told what to say when they get caught.” He further testified about “signs of deception” Valencia displayed during the post-arrest interview.

¶6 The state also called a detective with the Arizona Department of Public Safety to provide general testimony that, based on her experience investigating narcotics crimes, “drug trafficking organization[s] . . . treat their business like a business.” She detailed methods used for hiring drivers, purchasing and registering vehicles for the drivers, and rendering payment. She also stated that possession of fifteen pounds of methamphetamine, valued at upwards of \$60,000, would “[a]bsolutely [be] for sale” rather than personal use, and “a person will not be a blind mule” for that quantity of methamphetamine.” The detective further testified that consenting to a search is “very common” among drug traffickers because it allows “for them to apply deniability” and “to distance themselves from the narcotics.”

¶7 Valencia was found not guilty of transportation of dangerous drugs for sale, but was convicted of the lesser-included offense of possession of dangerous drugs for sale, a class two felony. She stipulated

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<sup>1</sup>Valencia was first tried in June 2016, but after the jury was unable to reach a verdict, the trial court declared a mistrial.

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to a historical prior conviction and was sentenced to a mitigated, flat-time prison term of eight years. We have jurisdiction over her appeal pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A).

**Alleged Improper Testimony**

¶8 Valencia argues “error was committed when the state presented expert opinions of drug courier profiling and modus operandi testimony.” The state responds that all of the challenged testimony was properly admitted and, in any event, Valencia’s challenges are waived except for fundamental error. Valencia concedes she did not contest the evidence at trial and raises this argument for the first time on appeal; we therefore review only for fundamental error. *See State v. Bible*, 175 Ariz. 549, 572 (1993).

¶9 Our supreme court has recently revisited and clarified the standards for determining fundamental error in *State v. Escalante*, 245 Ariz. 135 (2018). If on appeal a defendant establishes trial error, the appellate court determines, based on the totality of the circumstances, whether the error was fundamental. *Id.* ¶ 21. The defendant bears the burden of establishing fundamental error by “showing that (1) the error went to the foundation of the case, (2) the error took from the defendant a right essential to his defense, *or* (3) the error was so egregious that he could not possibly have received a fair trial.” *Id.* Should the defendant establish fundamental error under either of the first two prongs, a separate showing of prejudice is required, but if fundamental error is shown under the third prong, prejudice is presumed. *Id.*

¶10 Here, it cannot be said any of the errors complained of were so egregious as to have obviously denied Valencia a fair trial. While such an error “encompasses either or both prongs one and two,” to satisfy the third prong of the fundamental error test, and therefore become entitled to presumed prejudice, “the error must so profoundly distort the trial that injustice is obvious without the need to further consider prejudice.” *Id.* ¶ 20. No such distortion exists in this case.

¶11 Valencia contends the state’s testimony at trial was improper because the witnesses “drew parallels between [Valencia] and drug traffickers and evade[d] the province of the jury on the ultimate issue.” Drug courier profile evidence is a “loose assortment of general . . . characteristics and behaviors used by police officers to explain their reasons for stopping and questioning persons about possible illegal drug activity.”

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*State v. Lee*, 191 Ariz. 542, ¶ 10 (1998). The use of drug courier profile evidence is generally impermissible as substantive proof of guilt, because it “creates too high a risk that a defendant will be convicted not for what he did but for what others are doing.” *Id.* ¶ 12 (quoting *State v. Cifuentes*, 171 Ariz. 257, 257 (App. 1991)). Thus, courts preclude witnesses from testifying whether, “based on their training and experience, a particular defendant ‘fits’ the profile of a drug dealer or drug trafficker.” *State v. Garcia-Quintana*, 234 Ariz. 267, ¶ 12 (App. 2014).

¶12 In contrast, *modus operandi* evidence is properly admitted to assist the jury in understanding the methods typically used by drug trafficking organizations. *State v. Gonzalez*, 229 Ariz. 550, ¶ 13 (App. 2012). Because such crimes “may be complex and involve multiple individuals, the role each person plays in committing the crime is most likely beyond the knowledge of the average juror.” *Garcia-Quintana*, 234 Ariz. 267, ¶ 13. Thus, a qualified law enforcement officer may provide expert opinion testimony “to explain how a person’s actions may indicate their active participation in a crime,” if the testimony “focuses on the usual patterns or methods used by a criminal . . . organization to commit a crime.” *Id.* ¶ 13. A witness may not, however, “provide an opinion comparing the *modus operandi* of such an organization with the conduct of a defendant in a particular case,” because that “is the province of the jury.” *Id.* ¶ 14.

¶13 Valencia concedes that “common” *modus operandi* evidence is admissible when a defendant disclaims knowledge, *see Gonzalez*, 229 Ariz. 550, ¶¶ 1, 15, but argues “there is often a very fine line between the probative use of profile evidence as background or *modus operandi* evidence and its prejudicial use as substantive evidence,” quoting *People v. Murray*, 593 N.W.2d 690, 694 (Mich. Ct. App. 1999). She asserts that line was crossed here by the state’s witnesses drawing “parallels between the defendant and drug traffickers and evad[ing] the province of the jury on the ultimate issue[.]” and that the “improper testimony went directly to the heart of [her] defense,” therefore constituting fundamental error.

¶14 The state counters that because Valencia had disclaimed knowledge of the specific type of drugs she was transporting, circumstantial evidence to the contrary was properly introduced. It disputes her characterizations of the testimony as “drug courier profile,” arguing that the state at no time attempted to show Valencia fit the profile of a drug courier. Instead, it contends that an experienced narcotics officer’s observations and informed opinions concerning details of Valencia’s responses and conduct after she was stopped were offered to show that

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seemingly innocent behavior, such as cooperation and consent to search, was not inconsistent with the type of organized drug trafficking involved and guilty knowledge. *See Gonzalez*, 229 Ariz. 550, ¶¶ 13-19 (recognizing that evidence regarding the modus operandi of drug traffickers may be admitted to rebut unknowing-courier defenses); *see also United States v. Cordoba*, 104 F.3d 225, 229 (9th Cir. 1997) (officer testimony that drug traffickers do not use unknowing transporters was proper modus operandi evidence). The state also points out that even improper profile evidence may nevertheless constitute harmless error. *See State v. Walker*, 181 Ariz. 475, 478 (App. 1995).

¶15 Given the particular facts at hand, we need not analyze each point of contention. Even assuming, without deciding, that some of the challenged testimony may have been improperly admitted, any error must have “deprived [Valencia] of the opportunity for the jury to render a verdict free of the taint of drug-courier profile evidence. [She] therefore must show that without this evidence and attendant argument, ‘a reasonable jury . . . could have reached a different [verdict].’” *Escalante*, 245 Ariz. 135, ¶ 29 (emphasis in *Escalante*) (quoting *State v. Henderson*, 210 Ariz. 561, ¶ 27 (2005)).

¶16 In this case, the elements of the crime required the state to show Valencia knowingly possessed a dangerous drug for sale. A.R.S. § 13-3407(A)(2) (“A person shall not knowingly. . . [p]ossess a dangerous drug for sale.”); *see also State v. Diaz*, 166 Ariz. 442, 444-45 (App. 1990), *vacated in part on other grounds*, 168 Ariz. 363 (1991). That knowledge, however, was provable through both direct and circumstantial evidence, including by showing Valencia “was aware of the high probability that [her vehicle] contained” a dangerous drug. *Diaz*, 166 Ariz. at 445. Valencia has failed to carry her burden of showing that “without the error, a reasonable jury could have plausibly and intelligently returned a different verdict.” *Escalante*, 245 Ariz. 135, ¶ 31; *see also State v. Martin*, 225 Ariz. 162, ¶ 14 (App. 2010).

¶17 Most significantly, Valencia’s express admissions in her post-arrest interview warranted her conviction of the lesser-included charge of possession of a dangerous drug for sale, notwithstanding any peripheral testimony. *See Escalante*, 245 Ariz. 135, ¶ 34 (“[T]he amount of error-free evidence supporting a guilty verdict is pertinent to [the prejudice] inquiry.”). Although she claimed she thought she was transporting marijuana rather than methamphetamine, the jury could readily disregard that statement given her additional admission that she knew she was doing

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“something illegal,” she had a hidden compartment welded into the dashboard of her vehicle, and she admitted “the plan” was to transport methamphetamine in the near future. Valencia also offered to work as an informant and said she would be able to tell police about the traffickers’ “next load and everything.”

¶18 The jury was properly instructed on the state’s burden of proof and that Valencia’s knowledge could be inferred from evidence showing she was aware of a high probability that her vehicle contained illegal drugs and that she acted with conscious purpose to avoid learning the true contents of the vehicle. *See Diaz*, 166 Ariz. at 445 (“Any self-imposed ignorance cannot protect appellant from criminal responsibility.”). The jury was shown video of Valencia’s post-arrest interview, and—even had it credited her disavowal of specific knowledge—Valencia’s admissions, together with her role in an organized trafficking plan, the sophisticated aftermarket compartment permanently installed in her vehicle, and the small fortune in methamphetamine in her possession, would overwhelmingly support a finding of intentional ignorance and constructive knowledge. *See State v. Jung*, 19 Ariz. App. 257, 261 (1973) (defendant’s “admission of possession of marijuana [and] the packaging and location of the cocaine” supported inference of knowing possession of cocaine for sale). Importantly, unlike in *Escalante*, which bears some factual similarities, it cannot be said that without the allegedly improper testimony, “very little evidence of guilt existed.” *Escalante*, 245 Ariz. 135, ¶ 39.

¶19 In clarifying what defendants must show in order to establish fundamental error, our supreme court in *Escalante* noted “the ‘could have’ standard is [not] easily satisfied. In keeping with *Henderson*’s pronouncement that appellate relief for fundamental error occurs in ‘rare cases’ and such error is ‘curable only via a new trial,’ the ‘could have’ inquiry necessarily excludes imaginative guesswork.” *Id.* ¶ 31. Accordingly, we conclude that absent the evidence Valencia objects to on appeal, no reasonable jury could have acquitted her of the lesser-included possession charge. *See id.* ¶ 29; *see also State v. Ramos*, 235 Ariz. 230, ¶ 20 (App. 2014).<sup>2</sup>

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<sup>2</sup>Valencia notes in passing “it is significant to point out” her first trial resulted in a hung jury and mistrial. The state responds that Valencia testified at her first trial but not at her second, alluding to the fact that the contested testimony here was not the only variable from the first trial to the

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**Disposition**

¶20 Because Valencia has not carried her burden of establishing fundamental error, her conviction and sentence are affirmed.

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second. The varied and unique nature of jury deliberations leads us to conclude that the previous mistrial is not a salient factor in our prejudice analysis, and we do not further address this undeveloped point.